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October 24, 2013

*Via E-mail*

Honorable Jesse M. Furman  
Thurgood Marshall  
United States Courthouse  
40 Foley Square  
New York, NY 10007

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RE: *Chicago Board Options Exchange, Incorporated v. International Securities Exchange, LLC*, Case No. 1:13-cv-01339-JMF

Dear Judge Furman:

Pursuant to the Civil Case Management Plan entered on April 10, 2013, Chicago Board Options Exchange, Inc. ("CBOE") and International Securities Exchange, LLC ("ISE") (collectively "the parties") respectfully submit this Joint Letter to update the Court on the status of the above-referenced case in advance of the conference scheduled for Thursday, October 31, 2013.

**(1) A statement of all existing deadlines, due dates, and/or cut-off dates**

The following existing deadlines are set forth in the Civil Case Management Plan. CBOE shall serve and file its Opening Claim Construction Brief no later than November 15, 2013, and ISE shall serve and file its Responsive Claim Construction Brief no later than December 16, 2013. If it chooses, CBOE will serve and file a Reply Claim Construction Brief no later than January 6, 2014. Subject to the convenience of the Court's calendar and following the submission of the claim construction briefs, the Court shall conduct a Claim Construction Hearing.

Pursuant to the Civil Case Management Plan, there are additional deadlines after Claim Construction. The parties' last day to serve interrogatories is February 10, 2014. Fact Discovery closes on March 10, 2014, by which date the parties shall complete fact witness depositions. On March 24, 2014, the parties shall file a Joint Preliminary Trial Report on Close of Fact Discovery. Not later than April 21, 2014, each party shall serve on the other party an Initial Expert Report. Not later than May 19, 2014, each party shall serve on the other party a Rebuttal Expert Report. Expert Discovery closes on June 9, 2014 and the parties shall file Summary Judgment Motions within forty-five (45) days of the close of Expert Discovery (i.e. not later than

July 24, 2014). The parties shall file a Joint Final Trial Report forty-five (45) days after the close of Expert Discovery or, if summary judgment motions are filed, forty-five (45) days after Your Honor's ruling on the motions. The parties' best estimate of the trial ready date is October 6, 2014.

**(2) A brief description of any outstanding motions**

There is one outstanding motion in this case. On September 11, 2013, ISE filed a Motion to Stay Proceedings pending resolution of three *inter partes* review petitions filed with the USPTO concerning the three patents-in-suit. CBOE filed a response on September 30, 2013, and ISE filed a reply on October 9, 2013. The Court ordered that it will consider oral argument on this motion at the October 31, 2013 hearing.

**(3) A brief description of the status of discovery and of any additional discovery that needs to be completed**

The parties served initial disclosures on January 25, 2013 and first sets of Document Requests on January 25, 2013. ISE and CBOE responded to these requests on February 27 and 28, 2013, respectively. CBOE served a first set of interrogatories on February 11, 2013. CBOE served Initial Infringement Contentions on February 8, 2013, and ISE served preliminary and supplemental invalidity contentions on April 29, 2013 and October 15, 2013, respectively. To date, a combined total of approximately 150,000 pages of documents have been produced by both parties. The parties have been working to finalize search terms to locate additional documents, and have agreed previously to produce certain categories of documents without waiting for the search terms to be finalized. ISE produced documents responsive to a list of categories provided by CBOE and, in response to a first set of search terms provided by CBOE, collected and is currently reviewing about 650,000 emails and documents for rolling production to begin next week in advance of the October 31 conference. ISE has not yet finalized search terms, but has provided CBOE a list of document categories on June 24, 2013. CBOE has produced documents responsive to these categories and is continuing to collect and produce additional documents.

The parties anticipate conducting additional discovery. For instance, Requests for Admission have not yet been served by either party. ISE has not yet conducted any depositions; however, CBOE took a 30(b)(6) deposition of ISE on August 23, 2013, with respect to ISE's source code. On August 30, 2013, CBOE noticed additional 30(b)(6) depositions. ISE offered a witness for a November 21, 2013 30(b)(6) deposition, and is currently working to schedule dates for other 30(b)(6) witnesses. No fact or expert depositions have been conducted. Expert reports are scheduled to be exchanged in April, 2014.

The parties exchanged lists of proposed terms for construction on September 4, 2013 and Preliminary Claim Construction Statements on October 2, 2013. After a meet and confer to narrow claim construction issues, the parties exchanged second Preliminary Claim Construction Statements on October 11. Following an additional meet and confer, the parties filed a Joint Disputed Claims Terms Chart with the Court on October 16, 2013 identifying 18 terms for construction by the Court. Claim construction briefs have not yet been exchanged and a



*Markman* date is not yet scheduled.

**(4) A list of all prior settlement discussions, including the date, the parties involved, and the approximate duration of such discussions, if any**

In November 2012, CBOE's President, Edward Tilly, flew to New York and met with ISE's president, Gary Katz, however a settlement was not reached. On December 19, 2012, counsel for CBOE and ISE discussed settlement, however, again, a settlement was not reached.

**(5) A statement of the anticipated length of trial and whether the case is to be tried to a jury**

A jury trial has been requested by both parties. Trial is estimated to take two weeks.

**(6) A statement of whether the parties anticipate filing motions for summary judgment**

The parties anticipate filing motions for summary judgment.

**(7) Any other issue that the parties would like to address at the pretrial conference or any information that the parties believe may assist the Court in advancing the case to settlement or trial**

In accordance with the letter addressed to Your Honor from Michael Murray dated October 9, 2013, and the letter addressed to Your Honor from Steven Lieberman dated October 10, 2013, the parties would like to address ISE's outstanding Motion to Stay Proceedings at the October 31, 2013, conference.

Respectfully submitted,

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| <p><u>s/ Brian A. Tollefson</u><br/> Steven Lieberman (SL 8687)<br/> Joseph A. Hynds (admitted <i>pro hac</i>)<br/> Brian A. Tollefson (admitted <i>pro hac</i>)<br/> ROTHWELL, FIGG, ERNST &amp; MANBECK P.C.<br/> 607 14th Street, N.W., Suite 800<br/> Washington, D.C. 20005<br/> Ph: (202) 783-6040<br/> E-Mail: <a href="mailto:slieberm@rfem.com">slieberm@rfem.com</a><br/> <a href="mailto:jhynds@rfem.com">jhynds@rfem.com</a><br/> <a href="mailto:btollefson@rfem.com">btollefson@rfem.com</a></p> <p><i>Attorneys for Plaintiff<br/> Chicago Board Options Exchange,<br/> Incorporated</i></p> | <p><u>s/ Bryan N. DeMatteo</u><br/> Michael M. Murray (MM 5996)<br/> Bryan N. DeMatteo (BD 3557)<br/> WINSTON &amp; STRAWN LLP<br/> 200 Park Avenue<br/> New York, New York 10166<br/> E-mail: <a href="mailto:mmurray@winston.com">mmurray@winston.com</a><br/> <a href="mailto:bdematteo@winston.com">bdematteo@winston.com</a></p> <p><i>Attorneys for Defendant International<br/> Securities Exchange, LLC</i></p> |
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